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In The

Supreme Court of the United States

October Term, 1993

CLARK MERSHON, PAUL MERSHON AND GARY MERSHON,

Petitioners,

vs.

MISSOURI FARMERS ASSOCIATION, WILLIAM BEASLEY AND BRIAN GRIFFITH,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION

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COUNTER STATEMENT OF THE CASE

Summary of Facts

Petitioners' 38-page Statement of Facts is chock full of inaccuracies, misleading conclusions, "facts" not found in the record, irrelevant material and improper opinions. *See* pp. 3-6, *infra*. For their Counter Statement of Facts, Respondents direct this Court to The Eighth Circuit Court of Appeals' opinion in which the court set out the

following brief, yet complete, description of the relevant facts.

> Between 1983 and 1987, brothers Clark, Paul, and Gary Mershon farmed as a partnership in Bates County, Missouri. During that time, they borrowed money through a line of credit with the Missouri Farmers Association (MFA). The loan was secured by a lien on the crops to be harvested by the Mershons. In mid-1987, *after learning the Mershons had deposited directly into their personal bank account a check from a buyer of some of their crops*, the MFA filed a civil suit against the Mershons in state court to collect on the outstanding loan (the MFA won this suit in May, 1990).
>
> At the same time that the state court civil suit was filed, the MFA made a criminal complaint against the Mershons, alleging that they had defrauded a secured creditor, namely the MFA. The county prosecutor subsequently initiated criminal proceedings against the Mershons. . . . In early 1988, the Mershons appeared for a preliminary hearing on the state criminal charges. The state court found probable cause for prosecution. In late 1989, the county prosecutor withdrew from the criminal action, but the case was pursued by the state attorney general's office. In mid-1990, the state attorney general's office dropped the criminal charges against the Mershons.

Mershon v. Beasley, 994 F.2d 449, 450 (8th Cir. 1993), Appendix to Petition, C-2 through C-4 (emphasis added).

Respondents submit that this description of the facts is sufficient for purposes of the Petition. However, in

light of the admonition contained in Rule 15.1, Respondents make the following corrections to the Petitioners' Statement of Facts.[1]

Corrections to Petitioners' Statement of Facts

A. The Petitioners' statement that "in 1985 MFA knew [the Mershons] were selling grain but no one from MFA ever called them and complained about MFA not getting money or their name being on the checks," (Petition p. 10), is both false and misleading.

First, the Mershons themselves testified that they had no reason to believe that MFA knew they were selling grain in 1985 without getting MFA's name on the checks. (I Tr. 67).[2] Second, MFA's representatives testified that all of the grain checks which MFA knew of in 1985 were in fact made payable jointly to the Mershons and MFA. VI Tr. 261, Def. Ex. DDD-1 to DDD-9. Accordingly, there would be no reason for MFA to object to a practice it did not know was occurring.

B. The Petitioners' description of their lease with W.K. Jenkins – and in particular their statement that the lease "provided all checks were to be made out to W.K.

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[1] Respondents have chosen to ignore many of the factual misstatements contained in Petitioners' Statement of Facts for the reason that they are wholly irrelevant. Thus, for example, Respondents have ignored Petitioners' statement that they were once "farm family of the year," (Petition p. 8), even though that "fact" is nowhere in the record.

[2] References in the form "___ Tr. ___" are to the separately-paginated volumes of the trial transcript. References in the form "Def. Ex. ___" or "Pl. Ex. ___" are to the original trial exhibits.

Jenkins/Green Acres Farm until the lease was paid in full" – (Petition p. 11) is without any basis in the record. The lease was never marked as an exhibit, never mentioned at trial and there was no testimony about the terms of the lease by any witness.

C. Similarly, Petitioners' statement that they "immediately informed the first secured creditor, W.K. Jenkins, the check had been deposited," (Petition pp. 15-16), is again without any basis in the record. W.K. Jenkins was not a witness at trial and the Mershons never testified as to this "fact".

D. The Petitioners' description of "the Mershons' past practice with MFA," (Petition pp. 16-17), is both inaccurate and incomplete. The only checks which the Mershons "deposit[ed] into the bank" were checks which were jointly payable to the Mershons, MFA and the Farmers Home Administration ("FmHA"). VI Tr. 26. MFA endorsed those checks for deposit into an FmHA supervised account for subsequent payment to MFA.[3] Because the FmHA's security interest in those crop proceeds was junior to MFA's lien, this practice did not jeopardize the proceeds. VI Tr. 25-28.

E. When Petitioners' state that "MFA would sign off on" checks (Petition p. 17), they fail to mention that when MFA did endorse checks over to the Mershons they required the Mershons to sign a "Partial Release of Collateral Agreement." Def. Ex. V. That agreement expressly required the Mershons to acknowledge the fact that MFA

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[3] Checks written on that account had to be countersigned by the local FmHA representative. VI Tr. 25.

continued to possess a security interest in the remaining crops. Def. Ex. V.

F. The Petitioners' recitation of events surrounding a photocopy of a photocopy of a $1,919.98 check (Petition pp. 19-21) fails to mention the fact that the original document was "lost" by Petitioners' counsel, V Tr. 63, 68-69, and was thus not available to disprove the Petitioners' fanciful argument.

G. The Petitioners' statement that the Bates County prosecutor sent "blank criminal complaints" to MFA (Petition p. 24) is false. Rather, the trial testimony established that the complaints were complete except for the date and the formal name of the complainant. III Tr. 177, 192.

H. The Petitioners' description of the events leading up to the signing of the criminal complaints (Petition pp. 24-26) and their recitation of "[t]he only facts" that MFA had at the time it signed the criminal complaints (Petition pp. 28-29) is grossly incorrect.

The undisputed evidence established that *prior* to signing the criminal complaints MFA obtained a copy of a cancelled check from Highley Feed & Supply, Inc. for $1,424.91 which was made payable solely to the Mershons. That check – which was for the sale of grain which MFA had a security interest in – had been endorsed by the Mershons and deposited into their personal bank account. V Tr. 175-77.

I. The Petitioners' description of the state court preliminary hearing (Petition pp. 38-45) is false and misleading. As just one example, Respondents point to the

Petitioners' contention that an MFA witness falsely testified at the preliminary hearing that he saw one of the Mershons harvesting their crop. (Petition p. 44). As the court of appeals correctly noted, however, "the transcript of the preliminary hearing actually reflects that the testimony was that Paul Mershon was observed *planting* crops, not *harvesting* them." *Mershon v. Beasley*, 994 F.2d 449, 454 (8th Cir. 1993), Appendix to Petition, C-23 (emphasis added).

J. Contrary to the Petitioners' statement (Petition p. 45), the criminal charges against them were not dismissed *with* prejudice. The state attorney general filed a *nolle prosequi*, which is a dismissal *without* prejudice under Missouri law. *See Jones v. State*, 771 S.W.2d 349, 351 (Mo. App. 1989).

K. Finally, the Petitioners' statement that they attempted to introduce evidence of a "pattern and practice of seeking criminal prosecution against other defaulting debtors," (Petition p. 45), is false and misleading.

First, the Petitioners' evidence of a "pattern and practice" consisted of two instances when MFA contacted law enforcement officials concerning suspected criminal activity. V Tr. 82. Respondents submit this evidence hardly constitutes a "pattern and practice."

Second, the Mershons fail to disclose to this Court the fact that they did not even challenge the trial court's ruling excluding this evidence in their appeal to the Eighth Circuit.

REASONS FOR NOT GRANTING THE WRIT

Respondents submit that, stripped of all its rhetoric, the Petition in this case seeks to have this Court review this case for the purpose of rewriting Rule 50(a) of the Federal Rule of Civil Procedure so that instead of reading:

> "no legally sufficient evidentiary basis for a reasonable jury"

it would read:

> "no possible basis for any jury – even an unreasonable jury."

(Petition pp. 51-52). Respondents submit that such a suggestion is – on its face – without any merit whatsoever.

Rather, Respondents believe that the language contained in the present Rule 50 serves the salutatory purpose of preventing runaway juries from ignoring the law. As explained by Professor Cooper, "[t]he vital justification for the institution of directed verdicts is found in the need to provide at least some minimal device for preserving the integrity of the legal rules given by judges." Edward H. Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 MINN. L. REV. 903, 907 (1971). Without this control, juries could simply decide cases based on which of the parties was most attractive or some other extra-legal consideration.[4]

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[4] In fact, the Respondents in this case – a large corporation, an attorney and a bill collector – were hardly an "attractive" group. Further, Petitioners' counsel made much of this fact during her closing argument. VIII Tr. 78, 86, 122, 125.

Furthermore, certiorari is an inappropriate vehicle for amending Rule 50. Rather, if this Court sees a need to amend the rule it should do so in the fashion prescribed by Congress for amending the Federal Rules of Civil Procedure.[5] *See* 28 U.S.C. § 2072 (1990). This Court should not bypass these procedures and amend Rule 50 simply by granting certiorari in this one case.

Moreover, Respondents submit that because the rule is not broken it does not need to be fixed. Rather, Respondents submit that both the lower courts and this Court have consistently applied the standard set forth in Rule 50 and have repeatedly affirmed judgments entered as a matter of law when there has been "no legally sufficient evidentiary basis for a reasonable jury to have found for the [prevailing] party."[6] *See, e.g., Brook Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578 (1993) (Court affirmed the district court's finding of judgment as a

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[5] In fact, this Court had ample opportunity to change the Judgment as a Matter of Law standard in Rule 50 when that rule was amended in 1991 and again when this Court presented a host of revisions to the Rules of Civil Procedure this past year. This Court's failure to make such a change is persuasive evidence of a lack of desire on this Court's part to adopt Petitioners' view.

[6] Contrary to Petitioners' suggestion (Petition p. 50), Justice Scalia did not "lament[] the vagueness of the 'reasonable person' standard" in *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367 (1993). Rather, Justice Scalia commented that the terms "objectively abusive" or "objectively hostile" do not provide a "very clear standard" to judge harassment claims under Title VII of the Civil Rights Act of 1964. *Id.* at 372. Respondents submit that this mischaracterization of Justice Scalia's statement is telling evidence of the Petitioners' 'lamentable' inability to accurately present the facts and issues in this case.

matter of law contrary to the jury's verdict after a 115-day trial involving almost 3,000 exhibits and over 20 witnesses).

CONCLUSION

Because the Petition fails to raise an important question of federal law which has not been, but should be, settled by this Court, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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